

STATE OF ARIZONA

DEPARTMENT OF INSURANCE

JUN 3 1999

DEPT. OF INSURANCE
BY Kath

In the Matter of:)
)
CAPITAL MARKETS ASSURANCE)
CORPORATION (NAIC No. 20877),)
Petitioner.)

Docket No. 98A-212-INS

ORDER

On May 26, 1999, the Office of Administrative Hearings, through Administrative Law Judge Casey J. Newcomb, issued a Recommended Decision of the Administrative Law Judge (“Recommended Decision”), a copy of which is attached and incorporated by this reference. The Director of the Department of Insurance has reviewed the Recommended Decision and enters the following Order:

1. The recommended Findings of Fact and Conclusions of Law are adopted.
2. The Petitioner’s protest of the Department’s retaliatory tax assessment is denied.

NOTIFICATION OF RIGHTS

Pursuant to A.R.S. § 41-1092.09, the aggrieved party may request a rehearing with respect to this Order by filing a written motion with the Director of the Department of Insurance within 30 days of the date of this Order, setting forth the basis for relief under A.A.C. R20-6-114(B).

The final decision of the Director may be appealed to the Superior Court of Maricopa County for judicial review pursuant to A.R.S. §§ 12-904 and 20-166. A party filing an appeal must

1 notify the Office of Administrative Hearings of the appeal within ten days after filing the complaint
2 commencing the appeal, pursuant to A.R.S. § 12-904(B).

3 DATED this 3rd of June, 1999

4
5 

6 Charles R. Cohen
7 Director of Insurance

8 A copy of the foregoing mailed
9 this 3 day of June, 1999

10 Sara M. Begley, Deputy Director
11 Catherine O'Neil, Legal Affairs Officer
12 Gary Torticill, Assistant Director
13 Kelly Stephens, Deputy Assistant Director
14 Department of Insurance
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Capital Markets Assurance Corporation
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Armonk, NY 10504

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22 
23

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 In the Matter of:

Docket No. 98A-212-INS

4
5 CAPITAL MARKETS ASSURANCE
6 CORPORATION (NAIC NO. 20877)

**RECOMMENDED DECISION
OF THE ADMINISTRATIVE
LAW JUDGE**

7 Petitioner.

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11 On or about April 2, 1999, the undersigned Administrative Law Judge received a
12 Memorandum from the Arizona Department of Insurance (the "Department") regarding
13 the Department's assessment of a retaliatory tax against the Petitioner for the 1997
14 calendar year. On or about May 5, 1999, the undersigned Administrative Law Judge
15 received a Reply Memorandum from Capital Markets Assurance Corporation (the
16 "Petitioner"). Capital Markets Assurance Corporation was acquired by MBIA Insurance
17 Corporation on February 17, 1998. This Recommended Decision shall apply to both of
18 these insurance companies.

19
20 On May 11, 1999, a hearing was held on the Petitioner's Appeal of the
21 Department's assessment regarding the underpayment of retaliatory taxes for the 1997
22 calendar year. Assistant Attorney General Patrick Irvine represented the Arizona
23 Department of Insurance. William J. Carta and Kenneth L. Maxon appeared on behalf
24 of the Petitioner. Evidence and testimony were presented. Based upon a review of the
25 entire record (including the aforementioned memoranda), the following Findings of Fact,
26 Conclusions of Law and Recommended Decision are made.

27 **FINDINGS OF FACT**

28
29 1. The Petitioner is a financial guarantee insurance company domiciled in the state of
30 New York. It is one of five companies in the United States that insures the payment of

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1 municipal bonds and asset backed securities. None of these five insurance companies is
2 domiciled in Arizona or organized under Arizona law. The Petitioner does not issue life
3 insurance or property casualty insurance. William C. Carta is the Petitioner's Vice
4 President and Tax Manager.

5 2. The Petitioner was assessed a retaliatory tax of \$1,704.65 plus penalties and interest
6 for the 1997 tax year. The Petitioner argued that the Department incorrectly determined
7 the Petitioner's retaliatory tax. The Petitioner argued that it is entitled to a refund of
8 \$514.00 from the Department.
9

10 3. The Petitioner argued that the purpose of the retaliatory tax laws is to equalize the
11 taxation of insurance companies throughout the insurance industry. The Petitioner
12 argued that to achieve equality, the Department's taxes must be computed in the same
13 way that another state would compute its taxes on an Arizona insurance company doing
14 business with that state.
15

16 4. The Petitioner argued that the Department's methodology in calculating the
17 Petitioner's retaliatory tax has resulted in an undue burden on the Petitioner because the
18 Department has included taxes (i.e. fire department taxes) in its retaliatory tax rate
19 calculation that the Petitioner does not have to pay within its domiciliary state of New
20 York. Furthermore, the Petitioner argued that Arizona insurance companies that do not
21 issue fire insurance policies within the City of New York would also not have to pay this
22 tax either. Accordingly, the Petitioner argued that the Department's retaliatory tax is
23 unfair because it imposes a greater tax burden on New York domiciled insurance
24 companies (i.e. the Petitioner) doing business in Arizona than Arizona insurers doing
25 business in New York because all New York insurers are subject to New York's fire
26 department taxes via the Department's retaliatory tax rate calculation.
27

28 5. The Petitioner argued that the Department determines a retaliatory tax rate that is
29 based on the ratio of taxes paid by domestic insurers to premiums subject to the tax. The
30

1 statute requires that the Department make separate calculations for life insurance
2 companies and other insurers. The Petitioner argued that none of the Arizona insurance
3 companies subject to New York taxes are in the same line of business as the Petitioner.
4 Accordingly, the Petitioner argued that the “other insurance company” rate does not
5 accurately reflect the tax burden placed upon the Petitioner and therefore, it is unfair and
6 discriminatory.

7
8 6. The Petitioner further argued that the Department’s retaliatory tax calculation is in
9 direct contrast to the calculation required by Arizona statute. The Petitioner argued that
10 A.R.S. §20-230(A) requires that:

11 [T]he addition to the rate of tax payable by Arizona insurers shall
12 be calculated by dividing the aggregate of the tax obligations **paid**
13 by Arizona insurers to any such city, county or other political
14 subdivision of such state or foreign country by the aggregate of
15 their taxable premiums under the premium taxing statute of such
16 state or foreign country.

17
18 A.R.S. §20-230(A)(emphasis added). However, the Petitioner argued that A.A.C. R20-
19 6-206(D) requires Arizona insurers to report the following:

20
21 The total local or regional taxes **payable** in the foreign country or other state
22 for the calendar year covered by the insurer’s Premium Tax and Fees Report,
23 and . . .

24
25 A.A.C. R20-6-206(D)(1995)(emphasis added).

26
27 7. The Petitioner argued that the plain meaning of the words “paid” and “payable” are
28 different and therefore, the statute and rule (regarding the data required for determining
29 the retaliatory tax rate) require different information. The Petitioner argued that
30 because A.A.C. R20-6-206(D) requires Arizona domiciled insurers to report taxes

1 payable instead of only taxes paid, the retaliatory tax is overstated. The Petitioner
2 argued that this overstatement causes significant harm to the Petitioner because it must
3 pay more taxes than Arizona domiciled insurers doing business in the state of New
4 York.

5 8. The Petitioner further argued that the Department's retaliatory tax rate is incorrect
6 because it is higher than the maximum local tax that can mathematically be imposed by
7 the New York Metropolitan transportation district.
8

9 9. The Department argued that calculating the hypothetical tax for a city in another
10 state is never an exact science. The Department argued that the Arizona State
11 Legislature has statutorily promulgated how the Department is to calculate the
12 Petitioner's retaliatory tax. The Department argued that the Arizona State Legislature
13 could have required that local and regional retaliatory taxes be based on the maximum
14 tax that could be imposed by the other state and its localities. However, the Arizona
15 Legislature instead chose to look at the actual burdens imposed upon Arizona insurers.
16 The Department argued that it must follow the statutory mandate of the Arizona State
17 Legislature in calculating the Petitioner's retaliatory tax.
18

19 10. The Department argued that the Petitioner is a unique insurer. Unfortunately, the
20 Arizona State Legislature has set forth only two separate classifications of insurers (i.e.
21 life insurers and "other insurers") for determining the retaliatory tax. The Department
22 argued that the Petitioner should petition the Arizona State Legislature to create more
23 classifications for calculating the retaliatory tax.
24

25 CONCLUSIONS OF LAW

26 1. The Petitioner has the burden of proof, and the standard of proof on all issues is by a
27 preponderance of the evidence. Culpepper v. State, 187 Ariz. 431, 930 P.2d 508 (App.
28 1996). A "preponderance of the evidence is such proof as convinces the trier of fact that
29
30

1 the contention is more probably true than not." Morris K. Udall, *Arizona Law of Evidence*,
2 §5 (1960). It "is evidence which is of greater weight or more convincing than the
3 evidence which is offered in opposition to it; that is, evidence which as a whole shows that
4 the fact sought to be proved is more probable than not." *Black's Law Dictionary*, 1182
5 (6th ed. 1990).

6 2. There is a clear presumption that an additional assessment of a tax is correct and
7 the burden is on the Petitioner to overcome such presumption. Arizona State Tax
8 Commission v. Kieckhefer, 67 Ariz. 102, 105 (Ariz. 1948).

9
10 3. The State of Arizona generally imposes a two percent tax on premiums that
11 insurance companies receive on insurance policies and contracts covering "property,
12 subjects or risks located, resident or to be performed in Arizona." See A.R.S. § 20-224.
13 Arizona law also provides for retaliation against insurers from other states when the
14 laws of the other state do not treat Arizona insurers as well as Arizona treats them.
15 See A.R.S. §20-230.

16
17 4. The Arizona State Legislature has established the following formula for calculating a
18 foreign insurer's retaliatory tax burden:

19
20 . . . For the purpose of this section, the director shall compute the burden
21 of any tax, license or other obligation imposed by any city, county or other
22 political subdivision of a state or foreign country on insurers of this state or
23 their agents on an aggregate statewide or foreign countrywide basis as an
24 addition to the rate of tax payable by Arizona insurers in such state or foreign
25 country. The addition to the rate of tax payable by Arizona life insurers shall
26 be calculated separately from the addition to the rate of tax payable by other
27 Arizona insurers. In each case, the addition to the rate of tax payable by
28 Arizona insurers shall be calculated by dividing the aggregate of the tax
29 obligations paid by Arizona insurers to any such city, county or other political
30

1 subdivision of such state or foreign country by the aggregate of their taxable
2 premiums under the premium taxing statute of such state or foreign country.

3 The director may issue rules to carry out the purpose of this section. . . .

4 A.R.S. §20-230(A).

5 5. The Department has adopted a A.A.C. R20-6-206 to implement A.R.S. §20-230(A).

6 The key determination (for purposes of this case) is "the addition to the rate of tax
7 payable by Arizona insurers." This is calculated by "dividing the aggregate of the tax
8 obligations paid by Arizona insurers . . . by the aggregate of their taxable premiums . . ."

9 The Department makes this determination by requiring Arizona domestic insurers to
10 report each year (1) the total local or regional taxes payable in each state that allows for
11 such taxes, and (2) the total premiums received taxable under the laws of those states.

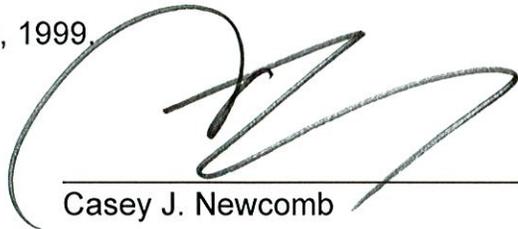
12 A.A.C. R20-6-206(D)(1995).

13
14 6. The Petitioner has raised some interesting arguments. However, the issues raised
15 by the Petitioner should be resolved at the Arizona State Legislature. Accordingly, the
16 undersigned Administrative Law Judge concludes that the Petitioner has failed to prove
17 that the Department has incorrectly calculated the Petitioner's retaliatory tax pursuant to
18 A.R.S. §20-230.

19 **RECOMMENDED DECISION**

20
21 The undersigned Administrative Law Judge recommends that the Petitioner's
22 protest of the Department's retaliatory tax assessment be denied.

23
24 Done this day, May 26, 1999.

25 
26 _____
27 Casey J. Newcomb
28 Administrative Law Judge

Original transmitted by mail this

27th day of May, 1999, to:

Mr. Charles R. Cohen
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By Sherry Mendez

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